

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-220611

DATE: October 25, 1985

MATTER OF: G.A. Braun, Inc.

## DIGEST:

Protest that award under a small business set-aside to a firm alleged to be a large business was improper is denied, where protester did not file size status protest with the contracting officer within 5 days after bid opening, as required by the regulations. Further, Small Business Administration determination in another procurement that same awardee was other than a small business was not reached until after bid opening in the protested procurement; was not brought to the contracting officer's attention before award; and by its terms was to apply prospectively only.

G.A. Braun, Inc. (Braun) protests the award of a contract to Jensen Corporation (Jensen) under Department of the Army invitation for bids (IFB) No. DAKF19-85-B-0041. We deny the protest.

The IFB, issued as a 100-percent small business set-aside, sought to procure washers and dryers. Bid opening was held on August 19, 1985, and on September 16, Braun, a bidder, was notified that award was being made to Jensen. At that time, Braun orally informed the agency that Jensen was not a small business concern, and also submitted a written protest to the contracting officer. Braun attached to the protest an August 27 Small Business Administration (SBA) decision issued in connection with another procurement, holding that Jensen was not a small business concern under the same size standard used in the Army solicitation: 500 or less employees. The reason, according to the SBA, was that as of March 1985, 100 percent of Jensen's voting stock was owned by a large business.

By letter dated September 18, the contracting officer denied Braun's protest as untimely and refused to terminate Jensen's contract, since the protest had not been filed

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within 5 days after bid opening. The contracting officer, however, assured Braun that Jensen would not be permitted to compete on future procurements set aside for firms with 500 or fewer employees. Braun protested to our Office on October 2.

Braun reasserts its contention that Jensen is not a small business concern. Braun further charges that in paragraph 7 of the IFB, the Small Business Concern Representation, Jensen either must have misrepresented its status as a small business or correctly certified that it was not a small business, in which case its bid should have been rejected as nonresponsive. Braun requests that the Army be required to terminate Jensen's contract and award a contract to Braun.

Pursuant to 15 U.S.C. § 637(b)(6) (1982), the SBA has conclusive authority to determine matters of small business size status for federal procurement purposes. Under the regulations implementing the SBA's authority, the controlling date for determining size status is the date of written representation as a small business, submitted as part of a firm's bid or offer, which the contracting officer may accept at face value unless it is challenged by another party or he has reason to question it. 13 C.F.R. § 121.3-8 (1984); Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.301(b) (1984). If an offeror or interested party does challenge a firm's self-certification by filing a protest with the contracting officer, the regulations require that the matter be forwarded to the SBA. 13 C.F.R. § 121.3-5(a); FAR, 48 C.F.R. § 19.302. To affect an ongoing procurement, however, the protest must be filed within 5 days after bid opening; although a protest filed later than that will be considered, any decision reached will affect only the firm's eligibility to compete on future small business set-asides. Id.

In the present case, at the time of the August 19 bid opening, the contracting officer had no reason to question Jensen's size status, and thus properly could accept Jensen's self-certification that it was a small business concern. While Braun thereafter protested Jensen's size status to the contracting officer, it did not do so until September 16, more than 5 days after bid opening. Although the August 27 SBA decision holding that Jensen was not a small business was issued prior to the award to Jensen, it was brought to the contracting officer's attention only after the award. Therefore, the award to Jensen was consistent with the regulations, and with the terms of SBA's

August 27 decision, which states only that Jensen will be prohibited from competing for future procurements subject to the 500-employee size standard. Finally, speculation by Braun notwithstanding, there is no evidence in the record that Jensen was aware, when it submitted its offer, that its stock ownership arrangement disqualified it as a small business, or that Jensen otherwise knowingly misrepresented itself as a small business in its August 19 bid.

Consequently, there is no legal basis for objecting to the contracting officer's decision to award the contract to Jensen or for requiring the contracting officer to terminate Jensen's contract.

The protest is denied.

*Harry R. Van Cleve*

Harry R. Van Cleve  
General Counsel